

01-1078 S.L.W. v. Smith's Food & Drug Centers Issued: 5/17/05

Smith's Food and Drug Centers, Inc. ("Smith's" hereafter) asks the Utah Labor Commission to review Administrative Law Judge Eblen's award of benefits to S. L. W. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

On October 16, 2001, Mrs. W. filed an application with the Commission to compel Smith's to pay workers' compensation benefits for injuries Mrs. W. allegedly suffered while working for Smith's on April 22, 2000. Among the benefits Mrs. W. claimed was temporary disability compensation to September 14, 2001. Mrs. W.'s answers to Smith's interrogatories also stated she was claiming temporary disability compensation to September 14, 2001.

Judge Eblen held the evidentiary hearing on Mrs. W.'s claim on September 13, 2002. Mrs. W.'s attorney's opening argument indicated that Mrs. W. intended to claim temporary disability compensation beyond September 14, 2001. Smith's attorney¹ responded in his opening argument that Smith's "would have an objection" to Mrs. W.'s claim for any temporary disability compensation after September 14, 2001, because she had not previously disclosed this additional claim. Smith's attorney did not ask Judge Eblen to rule on whether Mrs. W.'s additional claim would be considered as part of the hearing.

After the parties had submitted their opening arguments, Judge Eblen summarized the issues before her but did not include the issue of whether Mrs. W.'s post-September 14, 2001, claim should be considered. Smith's counsel did not advise Judge Eblen that she had overlooked that issue.

The parties proceeded with the hearing. Among other things, Mrs. W. testified to the factual basis for her claim to temporary disability compensation after September 14, 2001. Smith's did not object to this testimony.

The hearing concluded with closing arguments. Smith's briefly restated its objection to Mrs. W.'s claim to temporary disability compensation after September 14, 2001, but did not request any ruling on the issue from Judge Eblen.

On September 15, 2004, Judge Eblen awarded benefits to Mrs. W., including temporary disability compensation for the period after September 14, 2001.

Smith's sole argument on review is that Judge Eblen should not have entertained Mrs. W.'s claim for additional temporary disability compensation for the period after September 14, 2001, because she did not disclose that part of her claim prior to the evidentiary hearing.

DISCUSSION AND CONCLUSION OF LAW

It was Smith's obligation to clearly state its objection to Mrs. W.'s claim for temporary disability compensation after September 14, 2001, and to request a ruling from the ALJ. The Commission has carefully reviewed the transcript in this matter to determine whether Smith's took adequate steps to raise and preserve its objection. While Smith's opening and closing arguments briefly mention Smith's objection, Smith's comments on the subject were made almost in passing, with no request for a ruling. Likewise, after Judge Eblen left out Smith's objection from her summary of issues to be decided, Smith's neither restated its objection nor asked Judge Eblen to make a ruling. Finally, Smith's allowed Mrs. W. to testify without objection to the facts supporting her claim for the additional temporary disability compensation.

The Commission considers it insufficient for a party to merely mention an objection in opening and/or closing statements when, as here, there is no effort to actually obtain a ruling on the objection and no objection to testimony related to the objection. Under these circumstances, the Commission concludes that Smith's waived its objection to Mrs. W.'s claim for additional temporary disability benefits after September 14, 2001.

ORDER

The Commission affirms Judge Eblen's decision and denies Smith's motion for review. It is so ordered.

Dated this 17th day of May, 2005.

R. Lee Ellertson, Commissioner

1. Smith's current attorney did not represent Smith's during the evidentiary proceeding that gives rise to this motion for review.